Supreme Court, U.S.
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91-930

CASE NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

MURRELL D. FOSTER and
CAROLYN L. FOSTER,
Petitioners,

v.

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY-CORINNE CORLEY
Counsel of Record

JOHN F. ARENS
Counsel for Petitioner

THE ARENS LAW FIRM
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QUESTIONS PRESENTED

1. Does the lifting of an automatic stay in bankruptcy as to a creditor and that creditor's debt and collateral divest the bankruptcy court of subject matter jurisdiction with respect to the creditor, its debt, its collateral, and related issues?

2. Does a debtor in a proceeding under Chapter 12 of the Bankruptcy Code have an absolute right to dismissal of the case, or may the right to dismissal be defeated by a subsequently-asserted claim of fraud, for which conversion to a Chapter 7 proceeding is sought?

3. Assuming that fraud can defeat the Chapter 12 debtor's right to dismissal, does the debtor's unintentional failure to obey an order of the bankruptcy court constitute fraud within the meaning of the statute authorizing the court to convert the case on the basis of fraud committed by the debtor?

LIST OF PARTIES

This action arose in the context of the bankruptcy case of the petitioners, Murrell Dwain Foster and Carolyn Loretta Foster. The herein respondent, North Texas Production Credit Association, was a creditor in the bankruptcy and the proponent of the Motion to Convert Case to a Proceeding Under Chapter 7 of the Bankruptcy Code, from the disposition of which appeal was taken giving rise to the instant petition.

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OPINIONS BELOW

The U.S. Bankruptcy Court for the Northern District of Texas filed an opinion report at 121 B.R. 961 (Bkrtcy. N.D. Tex 1991), denying the petitioners' motion for voluntary dismissal of their Chapter 12 bankruptcy, and granting the respondent's Motion to Convert the case to a proceeding under Chapter 7. The U.S. District Court for the Northern District of Texas affirmed the bankruptcy court in an unreported opinion. Finally, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court *per curiam* and without opinion.

JURISDICTION

This case arises from an appeal to the Court of Appeals for the Fifth Circuit from a decision entered by the U.S. District Court for the Northern District of Texas, Lubbock Division, affirming the judgment of the U.S. Bankruptcy Court for the Northern District of Texas, Lubbock Division, granting the motion of the respondent, North Texas Production Credit Association, for conversion of the petitioners' Chapter 12 bankruptcy case to a proceeding under Chapter 12. The bankruptcy court's decision was entered on 27 November 1990. The notice of appeal therefrom was timely filed on 30 November 1991.

The district court's jurisdiction was predicated upon 28 U.S.C. § 158(a). That court's judgment was entered on 27 December 1990. The notice of appeal therefrom was timely filed on 02 January 1991.

The Court of Appeals' jurisdiction was based upon 28 U.S.C. § 1291. Its decision was entered on 09 September 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

11 U.S.C. § 362(d)

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 1208(b)

(b) On request of the debtor at any time, if the case has not been converted under section 706 of 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1208(d)

(d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

STATEMENT OF THE CASE

This proceeding arises from the affirmance by the U.S. Court of Appeals for the Fifth Circuit of the judgment of the U.S. District Court, Northern District of Texas, affirming the denial by the U.S. Bankruptcy Court, Northern District of Texas, Lubbock Division, of a Chapter 12 debtors' Motion for Voluntary Dismissal, and the affirmance of the bankruptcy court's grant of a creditor's Motion to Convert.

Prior to the filing of the above-referenced motion, the bankruptcy court had entered an order which by its terms lifted the automatic stay in bankruptcy as to the North Texas Production Credit Association (hereinafter "NTPCA"), allowing NTCPA to pursue its state common law remedies against the debtors, Murrell and Carolyn Foster (hereinafter "the Fosters"), who are the instant petitioners.

After the automatic stay was lifted, NTCPA sent a notice of foreclosure to the Fosters, who in turn tendered payment pursuant to that notice. The Fosters' tender was refused, and the Fosters commenced an action seeking equitable relief in the state district court in and for Deaf Smith County, Texas (hereinafter referenced as the "state court petition"). An *ex parte* temporary restraining order was duly sought and issued pursuant to the verified allegations in the state court petition. The state court petition was removed to the U.S. District Court for the Northern

District of Texas prior to a hearing on the merits of said petition.[1]

The Fosters duly filed a motion for remand. NTPCA filed a motion to refer the case to the bankruptcy court, which the district court granted on the narrow grounds that the petition for removal should have first been filed in the bankruptcy court, which the party seeking removal claimed had jurisdiction. The Fosters' Motion for Remand was never determined by the bankruptcy court, and remains pending.

At the same time as the Fosters filed their state court petition, they filed a Motion for Voluntary Dismissal in their bankruptcy. After that Motion was filed, NTPCA filed a Motion to Convert.

Those motions were taken up by the bankruptcy court on 26 November 1990. The Fosters' Motion for Voluntary Dismissal was denied; NTPCA's Motion to Convert was granted.

Thereafter, the Fosters timely filed their Notice of Appeal in the district court. A stay pending appeal was granted, and expedited appeal ordered. The District Court affirmed the lower court's ruling, and appeal to the Fifth Circuit followed. That court affirmed *per curiam* without opinion.

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[1]The foreclosure was subsequently re-noticed, and was resisted by the Fosters because, *inter alia*, the notice was defective. NTPCA conceded the defect and foreclosure was again postponed. It was then noticed for 04 December 1990; that foreclosure was stayed by the district court pending disposition of the appeal by that court. Finally, the sale was re-noticed for 01 January 1991, and took place on that date.

REASONS FOR GRANTING THE WRIT

1. The lifting of an automatic stay in bankruptcy as to a creditor and that creditor's debt and collateral divests the bankruptcy court of subject matter jurisdiction with respect to the creditor, its debt, its collateral, and related issues.

NTPCA sought, and obtained, a lift of the automatic stay in order to pursue its state rights against the Fosters. In lifting the automatic stay, the bankruptcy court relinquished any jurisdiction it may have had to adjudicate disputes between the Fosters and NTPCA.

Subsequent to the lifting of the automatic stay as to NTPCA, NTPCA instituted non-judicial foreclosure as to the real property securing the Fosters' promissory notes with NTPCA. The Fosters in turn asserted their state law remedies by obtaining a state court injunction of that foreclosure. These actions were founded in state law. Resort to state law could be had because the bankruptcy court had relinquished jurisdiction.

However, NTPCA protested the utilization of state law remedies by the Fosters. This protest took the form of removal to federal court and transfer to bankruptcy court of the action filed by the Fosters in state court, which action raised state common law defenses to the non-judicial foreclosure. After the proceeding was transferred to the bankruptcy court, NTPCA filed its motion to convert, which was predicated on the claims which the Fosters sought to litigate in state court.

The Fosters believe that the bankruptcy court improperly asserted subject matter jurisdiction, and ask this Court to grant certiorari to determine the proper scope of the bankruptcy court's subject matter jurisdiction subsequent to the lift of the automatic stay as to NTPCA, its debt and the collateral.

The circuit and district court cases which have addressed this issue have reached contradictory results.

In *Wilson v. Bill Barry Enterprises, Inc.*, 822 F.2d 859 (9th Cir. 1987), a creditor had obtained lift of the automatic stay imposed under the Bankruptcy Code in order to pursue an unlawful detainer action in state court. 822 F.2d at 860. The order entered by the bankruptcy court granted the relief from stay "[i]n the event that [the debtor] did not make [ordered] rental payments." *Ibid.*

The debtor in turn pursued its right to reinstatement in the state court. 822 F.2d at 860. The creditor removed to federal court, then sought dismissal on three grounds, only one of which is here relevant:

> First ... that the state court lacked jurisdiction because the petition infringed upon the exclusive jurisdiction of the bankruptcy court. Because the federal court's jurisdiction was derived from the state court, it also lacked jurisdiction.

Ibid. The district court agreed, entering an order of dismissal from which the debtor appealed. *Id.* at 860-861.

The Ninth Circuit reversed. 822 F.2d at 862. In so ruling, the court stated:

> Because of this statutory structure, the bankruptcy court's lifting of the automatic stay to allow the Wilsons to seek termination of the lease included Barry's right to petition for relief from termination, if declared. Thus, while the bankruptcy court had jurisdiction over Barry's right to seek reinstatement, it relinquished its jurisdiction when it granted relief from the automatic stay. As a consequence, the Orange County Superior Court had jurisdiction to hear Barry's petition.

Id. at 861.

Other court decisions have suggested that the assertion of subject matter jurisdiction subsequent to the lifting of the automatic stay is discretionary.

For example, in *In re Ridgemont Apartment Associates*, 105 B.R. 738 (Bkrtcy. N.D. Ga. 1989), the bankruptcy court stated:

> When this court terminate[d] the stay, it ... remove[d] the bankruptcy restraints prohibiting a claimant's exercise of ... non-bankruptcy rights or remedies with regard to the matter for which the stay was granted.

Ibid. The court then noted that the creditor "sought relief from the automatic stay to permit the exercise of ... non-bankruptcy remedies regarding its collateral". *Ibid.* The court concluded:

> [T]he bankruptcy court ... permitted the creditor to invoke the state court jurisdiction ...
>
> This court should not, and will not, disturb the state court ... in the exercise of its jurisdiction absent unusual and compelling circumstances.

Ibid. Finally, the court noted that:

> [t]he issue is ... whether this court should reimpose a stay and reassert its exclusive jurisdiction ... This court is of the opinion that it should not.

Ibid. Hence, the court indicated that the assertion of subject matter

jurisdiction was discretionary, leaving open the possibility that it might do so in an appropriate case, a result contrary to that announced by the Ninth Circuit.

A more strict result was reached by the bankruptcy court in *In re Terramar Mining Corporation*, 70 B.R. 875, 877 (Bkrtcy. M.D. Fla. 1987). In that case, the automatic stay had once been lifted, and the court declined to take jurisdiction of a dispute between the creditor and the debtor. In so declining, the court stated that it " ... [wa]s satisfied there is no statutory authority whatsoever in the Bankruptcy Code to reinstate an automatic stay once the stay has been lifted."[2]

A seemingly opposite result was reached in *In re Fricker; Fricker v. First Pennsylvania Bank, et al.*, 113 B.R. 856 (Bkrtcy. E.D. Pa. 1990).

Fricker involved an adversary proceeding in which the debtors sought to attack a sheriff's sale of their residence and the underlying obligation. 113 B.R. at 858-59. As to the relevant issue, the bankruptcy court stated:

> An action in which a debtor seeks to set aside a pre-petition sale of valuable property which, if set aside, would clearly be property of the debtor's estate, should generally be considered as not only a matter related to the debtor's bankruptcy case, but also may well be a core proceeding ...

Id. at 864. The court then held that the prior grant of relief from the automatic stay should not bar its exercise of discretionary jurisdiction

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[2]The foreclosure sale at issue in *Terramar* was ultimately enjoined because the lift of stay was qualified in a manner that prohibited the sale. 70 B.R. at 877.

because "while we believe that granting relief from the stay ... diminishes significantly the estate's interest in the [involved] property", in the case at bar the estate's interest remained significant because the debtor sought to bring the property back into the estate. *Ibid.*

Fricker is not on all fours with the instant case. Despite factual differences, because *Fricker* seems to advocate the assertion of subject matter jurisdiction over disputes between a debtor and a creditor when the automatic stay has been lifted, its holding contradicts that of the Ninth Circuit. With the instant ruling by the Fifth Circuit, a split in the circuits now exists. The need for this Court's interpretation of the relevant statute is thus paramount.

Moreover, this case presents a related issue of whether the respondent was a real party in interest with standing to seek conversion.

Remedy for fraud by a debtor in a Chapter 12 may only be sought by a "party in interest". 11 U.S.C. § 1208(d). The term "party in interest" is not defined in the Code. The legislative history indicates that the decision as to whether a claimant is a "party in interest" should be made on a case by case basis, with the caveat that the restriction of action to a party in interest is intended to prohibit the bankruptcy courts from acting *sua sponte*. *Collier on Bankruptcy*, ¶ 304.1, footnote 18.

From this, it would follow that NTPCA was not a party in interest because it had obtained a lift of the automatic stay in order to pursue its secured claims outside of bankruptcy, and by the terms of the Fosters'

Chapter 12 plan, it is clear that NTPCA had no unsecured claim. Since no claim of NTPCA remained to be adjudicated by the bankruptcy court under the plan of reorganization, NTPCA had no stake in the outcome of the bankruptcy and was not a real party in interest. If the Motion to Convert was made by an entity lacking standing to do so, subject matter jurisdiction would not vest in the bankruptcy court.

The petitioners urge this Court to grant certiorari to issue a definitive construction of section 1208(d). Such direction by this Court will protect the manifest intention of Congress to limit the class of entities which may defeat the debtor's right to protection and the circumstances under which that right may be curtailed.

2. A debtor in a proceeding under Chapter 12 of the Bankruptcy Code has an absolute right to dismissal of the case, which once asserted may not be defeated by a subsequent claim of fraud for which conversion to a Chapter 7 proceeding is sought.

The Chapter 12 debtor has an absolute right to voluntarily dismiss its proceeding:

> (b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1208(b).

In the instant case, the motion to convert was filed after the motion for voluntary dismissal. The two motions were taken up on the same day. Conversion was sought under 11 U.S.C. § 1208(d).

NTPCA supported its attempt to procure conversion of the Fosters' Chapter 12 by alleging fraud. That allegation purported to invoke section 1208(d) of the Bankruptcy Code, which provides as follows:

> (d) On request of a party in interest, and after notice and a hearing, the court may ... convert a case ... to a case under Chapter 7 ... upon a showing that the debtor has committed fraud in connection with the case.

11 U.S.C. § 1208(d). This section is in apparent conflict with the absolute right to dismissal set forth in § 1208(b).

Four cases have attempted to resolve this conflict or faced related issues.

In *In re Reinbold*, 110 B.R. 442 (Bkrtcy. D.S.D. 1990), the alleged fraud involved collateral intended to be conveyed to a creditor pursuant to the plan of reorganization.

The debtor Reinbold filed his Chapter 12 petition on 15 October 1987, and a plan of reorganization was confirmed on 22 July 1988. 110 B.R. at 443. As part of that plan, the debtor was required to surrender to the creditor Dewey County Bank (DCB) all farm equipment as to which DCB had a first lien or security interest. *Ibid.* Thereafter, DCB discovered that a series of lease-back/sales had occurred which resulted in the transfer of the equipment as to which the liens existed. *bid.*

The *Reinbold* court observed that "conversion to a Chapter 7 liquidation is admittedly a harsh result". 110 B.R. at 446. The court then held that conversion in that case was warranted because of a profound series of patently fraudulent actions by the debtor. However, in so holding, the court did not address the conflict between sections 1208(b) and 1208(d) but seemed to assume that the provisions of the two were compatible.

The Bankruptcy Court for the District of Utah considered similar issues in *In re Caldwell*, 101 B.R. 728 (Bkrtcy. D. Utah 1989).

In *Caldwell*, conversion was based on the debtor's fraudulent concealment of nearly $400,000 worth of assets. 101 B.R. at 730-731. The concealment was apparently part of a "complex" transaction between the debtor, "his son and others, and their various corporate entities". *Id.* at 731. Regarding that transaction, the testimony of the debtor "was vague and

confusing and the exhibits received into evidence only seem[ed] to scratch the surface of the dealings". *Ibid.*

After a lengthy discussion of the facts constituting the alleged fraud, the *Caldwell* court applied a "clear and convincing" standard to the question of whether fraud had occurred. 101 B.R. at 733. The court quoted with approval from Herbert, *Once More Unto the Breach, Dear Friends*, 16 Cap.U.L.Rev. 325, for the proposition that the "rights of others to seek conversion are narrowly circumscribed". *Id.* at 734, quoting Herbert at 352-353.

The Caldwell court ordered conversion, holding as follows:

> The Motion before the court is for conversion to Chapter 7. That is a harsh result for Caldwell who may be solvent. The court is aware that its ruling may provide a basis for future proceedings in this Chapter 7 case. However, all those consequences were foreseeable to Caldwell and his attorneys. *Absent Caldwell's election under section 1208(b) to dismiss this case,* he must now suffer the consequences of his actions.

110 B.R. at 740 (emphasis provided).

The *Caldwell* court's qualification is critical, in that it acknowledges that *if* the debtor had sought dismissal, conversion would not have thereafter been permitted. That is precisely the circumstance in the case at bar, and precisely the issue as to which this Court's guidance is needed.

Two other cases have resulted in conversion as a consequence of the debtor's fraud in connection with the bankruptcy case.

In *In re Graven*, 101 B.R. 109 (Bkrtcy. W.D.Mo. 1989), conversion was ordered upon discovery of an elaborate attempt to defraud creditors

through a transfer of property to a sham corporation and trust. 101 B.R. at 110-111. In the course of reciting its ruling, the *Graven* court noted that its position was the minority one. *Id.* at 113.

Finally, in *In re Zurface*, 95 B.R. 527 (Bkrtcy. S.D.Ohio 1989), the debtors transferred their property on the eve of foreclosure to a wholly owned corporation and for inadequate consideration. 95 B.R. at 535. The court granted the motion to convert on a showing of a history of activities designed to defraud creditors by the transfer and concealment of assets. *Id.* at 537-538.

The *Zurface* court did not attempt to resolve the conflict between sections 1208(b) and 1208(d), apparently because the debtor did not seek dismissal prior to the filing of the motion to convert. Hence, *Zurface* offers no indication of the court's position on point.

The gravamen of the request for certiorari as to this issue is whether a subsequently filed motion to convert can defeat the motion for dismissal already before the court. Section 1208(b) limits dismissal only if conversion had been *ordered*. Since it had not been *ordered*, dismissal should have been automatic. To otherwise construe section 1208(b) is to give the language of that section meaning other than that of the ordinary words of the section.

Because of the profound significance of the implicit meaning of the Fifth Circuit's order in this case, certiorari is imperative to resolve a problematic interpretation of the Bankruptcy Code. Compounding the

importance of the Fifth Circuit's implicit endorsement of the lower court's resolution of the conflict between section 1208(b) and 1208(d) is the issue of NTPCA's apparent lack of standing to seek conversion that query, discussed at page 7-8, *supra*, which enhances the urgency for the grant of certiorari in this case.

3. Assuming that fraud can defeat the Chapter 12 debtor's right to dismissal, the debtor's unintentional failure to obey an order of the bankruptcy court does not constitute fraud within the meaning of the statute, so that the court may not convert the case to a Chapter 7 proceeding.

The bankruptcy court based its grant of the Motion to Convert on the failure of the Fosters to obey an order of the court. The uncontroverted evidence before the Court at all phases of this case has been that the debtors did not *refuse* to obey any lawful order of the court; rather, they attempted at all junctures to obey all lawful orders of the court, but were thwarted in their efforts to do so, apparently by their own attorneys.

The order which the Fosters are alleged to have failed to obey is an order of the bankruptcy court entered on 17 August 1991. Pursuant to that order, certain documents of conveyance were to be signed by the Fosters. However, the uncontroverted evidence before the bankruptcy court was that the then-attorneys for the debtors provided documents for the Fosters to sign which did not contain the agreement of the parties. No evidence to the contrary was ever presented to the court by any party.

In cases which discuss refusal to obey a court's order as the basis of a denial of discharge, courts have consistently held the failure must be tantamount to a willful refusal. *See, e.g., In re Jones; Friendly Finance Discount Corp. v. Jones*, 490 F.2d 452, 456 (5th Cir. 1974) (grant of

discharge affirmed).

In *Jones*, as in the present case, the debtor's failure to obey the court's order was attributable to the debtor's attorney. 490 F.2d at 455. The bankruptcy court allowed the discharge, and the circuit court affirmed. *Id.* at 456. In so holding, the Fifth Circuit quoted with approval from a Second Circuit holding that "'[t]he denial of a discharge can work a serious deprivation upon a debtor, and there are many circumstances where a bankrupt's disobedience [is] ... excusable.'" *Ibid*, quoting *In re Kokoszka*, 479 F.2d 990, 997 (2nd Cir. 1973).

There is no rational basis for differently defining fraud where conversion is sought and where denial of discharge is sought. Hence, the Fifth Circuit has contradicted itself and the Second Circuit by affirming the lower court in the case at bar.

Because the bankruptcy court's holding that the failure to obey an order of the court constituted fraud sufficient to warrant conversion was affirmed without opinion by the Fifth Circuit, this Court should grant certiorari to determine the proper construction of the applicable sections of the Bankruptcy Code. Without guidance from this Court, an important area of federal law will be subject to inopportune interpretation by bankruptcy courts with only the instant circuit court affirmance as precedence.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, and the cause remanded to the district court for further proceedings after determination of the herein presented questions.

Respectfully submitted,

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Counsel of Record

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:	§	In Proceedings Under Chapter 12 of
	§	the Bankruptcy Code
MURRELL D. FOSTER and	§	No. 589-50331-12
CAROLYN FOSTER,	§	
	§	
Debtors.	§	

ORDER CONVERTING CASE TO CHAPTER 7

On this date came on to be heard the Debtors' motion to dismiss the captioned proceedings under Chapter 12 of the Bankruptcy Code and the motion of North Texas Production Credit Association to convert these proceedings to a liquidation under Chapter 7 of the Bankruptcy Code. After having heard the evidence and argument of counsel and considering this matter the court announced on the record its reasons for conversion of this case to Chapter 7.

It is therefore ORDERED that:

1. The Debtors' motion to dismiss is denied.

2. This case is immediately converted to a liquidation under Chapter 7 of the Bankruptcy Code. The United States Trustee is requested to immediately appoint a Chapter 7 trustee in this proceeding.

DATED: November 26, 1990

JOHN C. AKARD, BANKRUPTCY JUDGE

The Clerk shall furnish copies to:

Attorneys for the Debtors: Arens and Alexander, Attorneys at Law, 31 E. Center, Center Court Square, P.O. Box 1928, Fayetteville, AR 72702 and Donald L. Davis, Donald L. Davis, P.C., 902 Main Street, P.O. Box 602, Vega, TX 70902;

Attorney for North Texas Production Credit Association: Mr. H. DeWayne Hale, Hale, Spencer, Pronske & Trust, P.C., 901 Main Street, LB 131, Dallas, TX 75202;

Chapter 12 Trustee: Mr. Walter O'Cheskey, Trustee-in-Bankruptcy, 3223 S. Loop 289, Suite 315, Lubbock, TX 79423; and

United States Trustee: Mrs. Mary Frances Durham, United States Trustee's Office, United States Department of Justice, 9E-23 Federal Building, 1100 Commerce Street, Dallas, TX 75242.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1039

IN RE: MURRELL D. FOSTER and
CAROLYN FOSTER,

Debtors,

MURRELL D. FOSTER and
CAROLYN FOSTER,

Appellants,

VERSUS

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,

Appellee

Appeal from the United States District Court
For the Northern District of Texas
(CA 5 90 233 C)

(September 9, 1991)

Before BROWN, DAVIS, AND BARKSDALE, Circuit Judges.

PER CURIAM:[1]

AFFIRMED. See Local Rule 47.6.

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense to the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:

MURRELL D. FOSTER and CAROLYN FOSTER,	)	Case No. 589-50331
	)	Chapter 12
Debtors	)	

* * *

MURRELL D. FOSTER and CAROLYN FOSTER,	)	
Appellants,	)	
v.	)	
NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,	)	
	)	Civil Action No.
Appellee.	)	CA-5-90-233-C

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
JOHN C. AKARD, BANKRUPTCY JUDGE, PRESIDING

ORDER

Came on to be heard the appeal from the order of the Bankruptcy Court denying the debtors' motion to dismiss the chapter [sic] 12 proceedings and granting the motion of North Texas Production Credit Association to convert to a liquidation under chapter [sic] 7 of the Bankruptcy Code. After considering the argument of counsel, together with

the review of the transcript of proceedings before the Bankruptcy Court, the Court is of the opinion that the order converting the case to a chapter [sic] 7 proceeding should be in all things **AFFIRMED.**

This Court adopts as its findings those set forth in the transcript of proceedings before Bankruptcy Court beginning on page 57 thereof. The Court agrees with the reasoning set forth in the case of *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989). When the facts show that the debtors have abused the legal process and the bankruptcy process through fraud, the bankruptcy court has the authority to convert a chapter [sic] 12 proceeding to a chapter [sic] 7 liquidation, even though the debtors have filed a motion to dismiss the chapter [sic] 12 proceeding. The debtors in the case *sub judice* have used the bankruptcy proceedings as a subterfuge and as a "shell game," reflecting a pattern of intent to hinder, delay and defraud creditors.

This court hereby lifts the temporary stay and dissolves the temporary injunction heretofore ordered on December 4, 1990.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated December 27, 1990.

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:

MURRELL D. FOSTER and CAROLYN FOSTER,	)	Case No. 589-50331 Chapter 12
Debtors.	)	

* * *

MURRELL D. FOSTER and CAROLYN FOSTER,	)	
Appellants,	)	
v.	)	
NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,	)	
Appellee.	)	Civil Action No. CA-5-90-233-C

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
JOHN C. AKARD, BANKRUPTCY JUDGE, PRESIDING

JUDGMENT

For the reasons set forth in the order of even date herewith, the Court enters the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that the order of the Bankruptcy Court dated November 27, 1990, be and the same is in all things affirmed.

The Court hereby lifts the temporary stay and dissolves the temporary injunction heretofore ordered on December 4, 1990.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated December 27, 1990.

SAM R. CUMMINGS
United States District Judge